

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Rule on Motions Concerning  
Mail Preparation Changes

Docket No. RM2016-6

**COMMENTS OF THE ASSOCIATION FOR POSTAL COMMERCE**  
(September 2, 2016)

Pursuant to the Notice Reinstating Rulemaking issued by the Postal Regulatory Commission (“Commission”) on July 27, 2016, and the Notice of Proposed Rulemaking on Motions Concerning Mail Preparation Changes issued on January 22, 2016 (“NOPR”), the Association for Postal Commerce (“PostCom”) submits these comments on the Proposed Rule on Motions Concerning Mail Preparation Changes (“Proposed Rule”). While PostCom supports the general approach employed by the Commission in the Proposed Rule, the Commission should clarify several elements of the rule to ensure that the ability of mailers and the Commission to monitor and contest mail preparation changes with rate effects are strengthened and preserved. Principally, rather than relying on the concept of “actual or constructive” notice, the final rule should establish publication of a standard with a definite implementation date in either the Federal Register or other regular publication of the Postal Service as the start date for the 30-day period within which motions must be filed. Additionally, the Commission should affirm that the Proposed Rule has no impact on its independent authority to enforce the price cap or on the statutory right of the public to file complaints alleging violations of the price cap.

**I. CLARIFY, STRENGTHEN, AND STANDARDIZE NOTICE PROCEDURES**

The Proposed Rule requires interested parties to file “[m]otions concerning mail preparation changes . . . at least 30 days after a party has actual or constructive notice of the

implementation date of the change.” NOPR at 7. On its face, this language places no time limit on when a motion can be filed. The language of the Proposed Rule, read literally, means that any motion will be timely as long as it is filed at least 30 days *after* notice of the implementation date, even if the motion is filed years after the notice. The NOPR is clear that the Commission does not intend this result; the Commission states that the Proposed Rule “establishes a 30-day timeframe within which interested parties may file a motion.” NOPR at 3. The Commission should revise the language of proposed section 3001.21(d) to properly reflect its intent that motions be filed *within* 30 days of notice.

**A. Actual and Constructive Notice**

Assuming the Commission makes this change, however, the standard contained in the Proposed Rule still must be clarified. The Proposed Rule itself provides no definition of “actual or constructive notice,” and the NOPR provides little additional clarity. As written, the Proposed Rule does not even provide mailers with the basic information needed to determine when a motion challenging a mail preparation change would be due.

The Proposed Rule, to the extent it can be understood, would create a host of practical problems. First, “actual” and “constructive” notice, while conflated in the Proposed Rule, are two distinct concepts. Indeed, a mailer could have actual notice of the implementation date of a change in mail preparation requirements prior to the publication of the change, such as when the intent to publish the change is communicated informally to mailers or discussed during a Mailers Technical Advisory Committee meeting. If the 30-day period runs from this notice, the Proposed Rule might require the mailer to file its motion before the mail preparation change is published at all. To say the least, this situation would prove difficult for all involved parties. The mailer would be challenging, and the Commission would be evaluating, an unpublished rule, the content of which may have been communicated orally or in an informal document, such as a

PowerPoint presentation. The Postal Service, likewise, may be forced to defend its decision not to treat the change as one having rate effects before it has even formally announced its position on the issue. PostCom does not believe the Commission intended to create this situation, but by referring to “an announced mail preparation change,” rather than a “published” change, and beginning the 30-day period with “actual” notice, the Proposed Rule could foreseeably place the Commission in this difficult position.

Second, as the Commission acknowledges, mail preparation changes are announced through a variety of methods, including Federal Register notices, the Postal Bulletin, and the RIBBS website. NOPR at 3. In fact, mail preparation changes are often published in multiple sources, but not necessarily simultaneously. The Proposed Rule therefore places a significant burden on mailers to monitor multiple publications and determine which published notice constitutes “actual” or “constructive” notice of the change. In some cases, such as publication on RIBBS, the document may not be dated, making such publication a particularly poor candidate for constituting “constructive” notice, and the Proposed Rule does not provide any guidance as to what proof of the date of actual notice one must provide when filing a motion. The Proposed Rule creates a significant degree of uncertainty regarding when a published mail preparation change constitutes “constructive” notice.

Third, the Proposed Rule does not distinguish between draft and final mail preparation changes. It is conceivable that the Postal Service could announce a definitive implementation date for a mail preparation change before it has finalized the requirements for that change. Arguably, once the implementation date has been announced, mailers would have actual or constructive notice of the change, and the 30-day period for filing motions would begin. Yet requiring motions at this time, before the change has been finalized, would be inefficient. It

would risk motions being filed on proposals that are subsequently changed, thus rendering the motions moot. More importantly, this requirement would discourage collaboration between the Postal Service and industry. As PostCom and the Alliance of Nonprofit Mailers explained in their petition for rulemaking in Docket No. RM2015-12, one of the motivations behind establishing a protest procedure like the one outlined in the NOPR is to encourage the Postal Service and industry to discuss mail preparation changes in advance of their implementation to ensure that they do not have rate impacts (or that, if they do, the Postal Service is aware of these impacts and can act accordingly). Docket No. RM2015-20, Petition of the Association for Postal Commerce and Alliance of Nonprofit Mailers to Initiate Rulemaking Proceeding at 5 (Aug. 17, 2015). If the Proposed Rule is read to require mailers to challenge Postal Service proposals before they are finalized, this purpose could be defeated. Rather than work with the Postal Service to resolve issues, mailers will be forced to bring their concerns to the Commission prematurely.

All of these concerns can be resolved relatively easily, however, and the Commission need not dictate to the Postal Service how it is to communicate changes to mailers to do so. Simply modifying the Proposed Rule to refer to the “written publication,” rather than the “announcement,” of a mail preparation change would ensure that no motions would be due before a proposal is published. To prevent motions from being filed on draft proposals, the Commission should clarify that the 30-day period will begin only when a change has been published with a defined implementation date, that a new 30-day period will apply if there are material changes in the published mail preparation requirements prior to the implementation of the change, and that the Commission will, if necessary, accept motions but hold further proceedings in abeyance (or grant leave to re-file) if the Postal Service represents that its changes

are not yet sufficiently final to allow for a proper evaluation. To resolve confusion over whether notice is “actual” or “constructive” and whether publication in particular places constitutes notice, the Commission should direct the Postal Service to identify a publication in which all mail preparation changes will be published. Once the Postal Service has done so, the 30-day period will always run from the date that a final change with a stated, definite implementation date appears in that publication. The Postal Service may still communicate its changes through other vehicles, but the period for filing motions will be determined by publication in the specified document.

Finally, the Commission should reaffirm that it has the right to waive the 30 day requirement in specific instances. Such a waiver would be appropriate in instances when, due to the nature of the change or form of publication, the proper start date for the 30-day period is unclear or there is some doubt as to whether the standards published by the Postal Service represent final standards that the Postal Service intends to enforce as written. Judicious exercise of this authority will ensure that confusion over the proper start date for the 30-day filing period does not result in prices exceeding the price cap.

## **B. Burden of Proof**

While PostCom does not object to the 30-day period for motions contained in the Proposed Rule, this time period will only prove sufficient if the Commission recognizes certain practical realities. First, as discussed in the previous section, the Commission should waive the 30-day period or allow late filings when warranted by the specific facts of a case. Second, as discussed in Part II below, the Commission must retain its authority to review price cap compliance on its own initiative, and it must allow the public to bring complaints under 39 U.S.C. § 3662 outside of the 30-day window. Third, the Commission should apply a lower

standard of proof in determining whether a motion brought under the Proposed Rule merits further procedures than it would in determining whether to hear a complaint.

As to this last point, the Proposed Rule requires movants to “set forth with particularity the mail preparation change at issue and the grounds by which the mail preparation change must comply with § 3010.23(d)(2) of this chapter.” The Proposed Rule correctly declines to specify what information a party must provide in support of its motion, as the type of information available will differ in individual circumstances. But the Proposed Rule gives little guidance as to what standard the Commission will apply in determining whether a motion warrants further procedures.

In evaluating these motions, the Commission must understand that mailers may not be able to fully analyze the price impact of a change in mail preparation standards in 30 days, especially if the change has not been implemented before the period ends. Accordingly, motions brought under the Proposed Rule often will, out of necessity, be based on projections of impact, and mailers may not have access to data demonstrating this impact. If the Commission rejects such motions out of hand, the protections purportedly provided by the Proposed Rule will prove illusory. Instead, the Commission should apply a standard similar to that employed in a motion to dismiss and determine whether the mail preparation change would have a price impact if the consequences alleged by the movant were to occur.

Applying such a standard will not prejudice the Postal Service because, as the Commission explains in the NOPR, the Proposed Rule will not stay the implementation of mail preparation changes. NOPR at 5. Further, the Postal Service will be provided with an opportunity to respond and present any data in its possession indicating that the movant’s projections are unrealistic. As the burden of demonstrating compliance with the price cap

ultimately rests on the Postal Service, applying this standard to motions under the Proposed Rule fairly apportions the burden of proof at this initial stage, before the facts have been fully developed.

**C. Affirmative Statement of No Price Impact**

The Proposed Rule does not require the Postal Service to indicate that a change in mail preparation requirements does not implicate the price cap. NOPR at 4. Instead, it requires mailers to infer from the Postal Service's silence on this issue when it publishes such a change that the Postal Service has determined that the change will not implicate the price cap. It is not clear why the Commission has declined to require the Postal Service to affirmatively state that a change will not have price cap implications. Doing so would clarify the issue for mailers while imposing no additional burden on the Postal Service. As the Commission acknowledges in the NOPR, "the Postal Service has an affirmative burden to decide whether a mail preparation change requires compliance with the price cap rules." NOPR at 2. As the Postal Service already bears the burden of conducting this analysis, requiring it to state the results of its analysis would impose no additional burden. It would, however, provide welcome clarity for mailers.

**II. CLARIFY THAT COMPLAINT PROCEDURES AND EXISTING COMMISSION AUTHORITY REMAIN UNCHANGED**

The NOPR does not address the Commission's own authority under the PAEA to ensure that mail preparation changes that implicate the price cap are properly accounted for, nor does it discuss the rights of mailers and the Public Representative under 39 U.S.C. § 3662 to file complaints against Postal Service practices that violate the PAEA. Presumably, these topics are not discussed because the Proposed Rule does not purport to disturb or circumscribe the Commission's powers or the public's rights with respect to either topic. To remove doubt, however, the Commission should clarify in the preamble to the final rule that it retains

independent authority to investigate the Postal Service's compliance with the price cap and that mailers and the Public Representative retain their right to file complaints against practices they believe violate PAEA.

The Proposed Rule is based on the reasonable assumption that, other than the Postal Service, mailers and mail service providers are the parties likely in the best position to identify mail preparation changes with price cap impacts, as they are more familiar with the cost impacts of those changes and best able to predict how mailing behavior will change in response to mail preparation changes. It makes sense, then, to provide the industry with a defined procedure to bring those concerns to the Commission's attention. The Commission should not, however, abdicate its authority to independently oversee the Postal Service's rates and classifications. Whether in the context of reviewing an annual rate change or in the general course of business, the Commission should review the Postal Service's mail preparation changes and act independently if it determines that a change may result in prices in excess of the cap. As the Commission recognized in Order No. 1890, it has "a statutory duty to set the annual limitation on the percentage change in rates and enforce that limitation." Order No. 1890 at 27.

Similarly, 39 U.S.C. § 3662(a) permits "[a]ny interested person (including an officer of the Postal Regulatory Commission representing the interests of the general public) who believes the Postal Service is not operating in conformance with the requirements of the provisions of . . . this chapter" to file a complaint with the Commission. If the Commission finds the complaint justified, it may "take such action as [it] considers appropriate," including "ordering unlawful rates to be adjusted to lawful levels." 39 U.S.C. § 3662(c). The Commission's rules regarding complaints, which are not revised by the Proposed Rule, affirm these rights. *See* 39 C.F.R. §3030.2 (permitting "any interested person" to file a complaint on the belief that the Postal



Service is violating “[t]he provisions of 39 U.S.C. chapter 36 . . . or . . . [a]ny rule, order, or other regulatory requirement based on [those] statutory provisions”).

These complaint procedures provide an important protection for mailers in the context of changes to mail preparation standards. They allow mailers to bring complaints outside of the 30-day window if the rate impact of the mail preparation change is not discovered within that time. Without this assurance, the 30-day window prescribed in the Proposed Rule could prove unworkable, as in some cases it would be impossible for mailers to understand a proposed change, analyze its impacts, and prepare and file a motion with adequate support within that time. The complaint procedures ensure that violations of the price cap that are not immediately apparent can still be challenged.

As the NOPR is silent regarding the Commission’s authority to independently evaluate the price cap implications of a mail preparation change and proposes no changes to the Commission’s complaint regulations, PostCom assumes that the Commission intends to continue to exercise its oversight authority when warranted and that it will hear complaints brought after the 30-day period. To eliminate any confusion on this point, the Commission should consider including a statement affirming this understanding when it issues its final rules.

### **III. CONCLUSION**

While PostCom generally concurs with the approach adopted by the Commission in the NOPR, the Proposed Rule should be revised as discussed in these comments to ensure it promotes the PAEA’s goals of accountability and transparency. If the rules governing these motions do not provide mailers with sufficient clarity regarding their rights and obligations, resources that should be dedicated to working with the Postal Service to develop reasonable mail preparation requirements will instead be dedicated to legal analysis and litigation. PostCom encourages the Commission to revise the Proposed Rule as suggested to ensure that the Postal

Service is able to implement mail preparation changes as needed with limited disruption while still ensuring that such changes comply with the price cap and PAEA.

Respectfully submitted,

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